No. 92-259

In the Supreme Court of the United States

OCTOBER TERM, 1992

OKLAHOMA TAX COMMISSION, PETITIONER

v.

SAC AND FOX NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether and to what extent the Sac and Fox Reservation was diminished by the 1890 allotment agreement covering that Reservation.

2. Whether federal law permits Oklahoma to impose income taxes on income earned by members of the respondent Tribe in connection with their employment by the Tribe on land held in trust for the Tribe or its members.

3. Whether federal law permits Oklahoma to impose motor vehicle excise taxes and registration fees on automobiles owned by members of the respondent Tribe who live on allotted parcels held in trust for them by the United States.

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INTEREST OF THE UNITED STATES

This case concerns the taxing authority of the State of Oklahoma over members of the Sac and Fox Nation in Oklahoma. Because the United States has a special relationship with the Sac and Fox Nation and other Indian tribes and holds the land at issue in trust, it has an interest in the development of sound taxing principles in this setting.

STATEMENT

1. In 1867, a 480,000-acre reservation was established within the boundaries of what is now the State of Oklahoma for the Sac and Fox Nation of Indians (hereinafter "the Tribe"). 15 Stat. 495. In 1890, the Tribe executed an allotment agreement with com-

missioners appointed by the United States. Article I provided that the Tribe "hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to" a described tract of land, which covered all of the Reservation. 26 Stat. 750. The only exceptions to that cession were for a 160-acre parcel where the Sac and Fox Agency was located, and a nearby 640-acre parcel set aside for a school and farm. *Id.* at 750-751. Article II provided that, as consideration for the cession, each member of the Tribe was entitled to select an allotment of 160 acres of land, which would be held by the United States in trust in accordance with Article III of the agreement. *Id.* at 751-752. As further consideration, the United States agreed under Article IV to pay the Tribe the sum of $485,000, subject to a downward adjustment of $200 ($1.25 per acre) for each allotment in excess of 528. *Id.* at 752. Under Article V of the agreement, the remaining lands would "become public lands of the United States, and * * * be subject to white settlement." *Id.* at 753. Congress ratified the agreement in 1891, *id.* at 758, and the Presidential proclamation opening the lands to entry was made later that same year, 27 Stat. 989. Today, the United States owns approximately 1,000 acres in trust for the Tribe (which include the 800 acres withheld from the 1890 cession) and approximately 15,000 acres of land in trust for members of the Tribe. C.A. App. Exh. 13.

2. This case involves two types of taxes imposed by the State of Oklahoma. First, 68 Okla. Stat. Ann. § 2355 (West 1992) imposes a tax "upon the Oklahoma taxable income of every resident or nonresident

individual." The Tribe also imposes an income tax on all of its employees, both members and nonmembers. Pet. App. A3. Although the state tax code provides for a credit for "the amount of tax paid another state by a resident individual * * * upon income received as compensation for personal services in such other state," 68 Okla. Stat. Ann. § 2357.B.1 (West 1992), there is no provision for a credit for income taxes paid to the Tribe.

The second state tax scheme at issue here imposes motor vehicle excise taxes and registration fees. The excise tax is imposed at a rate of 3¼% on "the transfer of legal ownership of any vehicle registered in this state and upon the use of any vehicle registered in this state." 68 Okla. Stat. Ann. § 2103 (West 1992).[1] The annual vehicle registration fees consist of a $15 registration fee and a fee of 1¼% of the vehicle's value. 47 Okla. Stat. Ann. § 1132.A (West Supp. 1992). State law provides an exception from those taxes for a "visiting nonresident"; such an individual need not register his vehicle if it is properly registered in his native State and does not remain "for any period in excess of 60 days." 47 Okla. Stat. Ann. § 1125.C (West Supp. 1992). That exception does not apply to vehicles registered with

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[1] Although that provision standing alone taxes only vehicles registered in the State, it effectively imposes a tax on all vehicles used in the State, because 47 Okla. Stat. Ann. § 1105.B (West Supp. 1992) requires the "owner of every vehicle in this state * * * [to] possess a certificate of title as proof of ownership," and 47 Okla. Stat. Ann. § 1112 (West Supp. 1992) provides that "[e]very owner of a vehicle possessing a certificate of title shall, before using the same in this state, make an application for the registration of such vehicle with a motor license agent."

the Tribe, which taxes the ownership of vehicles principally garaged on lands subject to its jurisdiction. Pet. App. A3.

3. The Tribe filed suit against the Oklahoma Tax Commission in the United States District Court for the Western District of Oklahoma, arguing that it was unlawful for the Commission to impose the income taxes described above on individuals employed by the Tribe[2] or to impose the above-described motor vehicle taxes on persons who previously had registered their vehicles with the Tribe.[3] On cross-motions for summary judgment, the district court granted partial summary judgment in favor of each party. Pet. App. A9-A13. Although the parties extensively briefed the question whether the 1867 Sac and Fox Reservation had been disestablished by implementation of the 1890 Sac and Fox Allotment Agreement (J.A. 29-39, 45-49), the district court found it unnecessary to reach that question. Instead, it relied on the statement of this Court in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991), that an area

[2] The Tribe's complaint also appears to have alleged (at ¶ 33) that the State may not tax the income of any resident of the Sac and Fox Reservation. As it comes to this Court, however, the case is limited to taxation of tribal employees.

[3] Although Oklahoma police for some period of time apparently issued criminal traffic citations charging individuals with driving an unregistered vehicle when their vehicle had been registered with the Tribe, the predominant way of collecting the motor vehicle taxes appears to have been a refusal to issue new titles to purchasers of such vehicles until the back taxes and fees were paid. See Cross-Petition for Writ of Certiorari, at 9-10, *Oklahoma Tax Commission* v. *Sac and Fox Nation*, cert. denied, No. 92-499 (Nov. 9, 1992).

"validly set apart for the use of the Indians as such, under the supervision of the Government * * * qualifies as a reservation for tribal immunity purposes." Pet. App. A11. Treating the parcels held in trust for individual tribal members as a reservation under that rationale, the district court concluded that *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), bars the Commission from taxing the income of tribal members derived from tribal employment on trust land, but permits it to tax the income of nonmembers. Pet. App. A11-A12.[4] Turning to the motor vehicle taxes, the district court held that *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), bars petitioner from assessing an unprorated use tax on automobiles owned by tribal members and garaged on trust land, but allows petitioner to tax automobiles owned by nonmembers. Pet. App. A12-A13.[5]

4. Both parties appealed, and the Tenth Circuit affirmed. Pet. App. A1-A8. The court of appeals began by relying upon the *Citizen Band Potawatomi* case for the premise that all trust land set apart for Indians under government supervision has the status of a reservation for tribal immunity purposes. Pet. App. A3-A4. The court then held that, under *McClanahan*, state taxes may not be imposed on income

[4] In an opinion denying the parties' motions to reconsider its judgment, the court explained that all tribal employees who are members of the Tribe are exempt from state taxation, whether or not they live on a reservation or trust land. Pet. App. A16.

[5] In its opinion on reconsideration, the district court declined to determine whether petitioner could impose a prorated tax, because petitioner had not presented that question to the court. *Id.* at A17.

earned by tribal members whose income is derived from "tribal sources" on "tribal land." *Id.* at A5. The court rejected the proposition that the immunity recognized in *McClanahan* is limited to Indians who reside on the reservation (or here, on tribal trust lands). *Id.* at A4 n.3. The court did conclude, however, that petitioner lawfully could tax income earned by nonmembers. *Id.* at A5-A6.

The court of appeals also affirmed the district court's rulings with respect to the motor vehicle taxes. Pet. App. A6-A8. In its view, *Colville* and *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), establish that "a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes, whether in the nature of property or excise taxes." Pet. App. A7. The court also noted that the Commission had offered no evidence to show that the registration fees are tailored to the use of the vehicles "outside Indian country." *Ibid.* With respect to nonmembers, however, the court concluded that petitioner was free to impose its taxes. *Id.* at A7-A8.

5. Both parties filed petitions for certiorari. On November 9, 1992, the Court granted the petition of the Oklahoma Tax Commission in No. 92-259, and denied the cross-petition filed by the Tribe in No. 92-499.

SUMMARY OF ARGUMENT

1. Respondent's reservation was diminished by the 1890 allotment agreement. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463, 470-471 (1984), establishes an "almost insurmountable presumption" that a reservation has been diminished when Congress enacts a statute containing two features: language

that explicitly refers to cession or otherwise evidences the present and total surrender of all tribal interests; and an unconditional commitment by Congress to compensate the Indian tribe for the ceded land. The allotment agreement at issue in this case ceded all but 800 acres of respondent's earlier Reservation, and reflected compensation by Congress for the ceded land. Accordingly, respondent's formal Reservation was diminished by that agreement to the remaining 800 acres.

2. The lower courts concluded that petitioner could not apply its income tax to income earned by tribal members from activities on land held in trust for the Tribe or its members, based on the view that such land is functionally equivalent to a reservation in all respects. That conclusion is incorrect. The rule prohibiting State taxation of income earned on a reservation by reservation Indians rests on the long-standing notion that Indian tribes are not generally subject to a State's jurisdiction. That notion does not generally apply to individual Indians who do not live on a reservation or as part of a reservation community. Because both of the lower courts proceeded on the assumption that income tribal members earn on lands held in trust for the Tribe or its members is automatically exempt from state income taxation, they did not consider whether the members of the Tribe reside and work in a coherent reservation community. Accordingly, the case should be remanded to the district court for consideration of that question.

Additionally, the tax might infringe on "the right of reservation Indians to make their own laws and be ruled by them." See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980) (quoting

Williams v. *Lee*, 358 U.S. 217, 220 (1959)). Because the tax in this case is imposed on income the respondent Tribe pays its members in compensation for administering respondent's affairs, the tax infringes on that right. Because the permissibility of such an infringement turns on a particularized inquiry into the nature of the state, federal, and tribal interests at stake, and because the record does not contain the information necessary to conduct such an inquiry, the case should be remanded to the district court to allow it to consider that question as well.

3. The lower courts erred in invalidating the motor vehicle taxes imposed by petitioner. The basis for the lower courts' conclusion was their view that parcels of land allotted to respondent's members in 1890 necessarily have the status of a reservation for all purposes. As discussed above, that view is incorrect. At least under the historical circumstances of cession and allotment involved in this case, the individual trust allotments do not retain reservation status for purposes of evaluating petitioner's taxing jurisdiction over tribal members. Because respondent's formal Reservation is limited to the 800 acres excepted from the 1890 allotment agreement (together with any subsequently acquired parcels), the income of members of the Tribe who live outside that reservation is subject to petitioner's taxing jurisdiction, unless they reside in a reservation community. As discussed above, the lower courts have not yet considered that question. Accordingly, this aspect of the judgment of the court of appeals should also be vacated and the case should be remanded to the district court to allow it to consider that question.

ARGUMENT

I. THE ALLOTMENT AGREEMENT OF 1890 DIVESTED RESPONDENT OF ALL OF ITS RESERVATION EXCEPT FOR THE PARCELS NOT CEDED BY THE AGREEMENT

Respondent argued in the lower courts that the 1890 allotment agreement did not diminish the Tribe's 480,000-acre Reservation. Resp. C.A. Br. 5-12. We disagree, and believe that the only "reservation," in the formal sense, that remained after ratification of the 1890 agreement was the 800 acres of the earlier Reservation that were not ceded by the 1890 agreement.[6]

The courts below declined to resolve the question of the status of the 1867 Reservation. They found that issue to be irrelevant, because, in their view, all lands held in trust for the Tribe or its members must be treated as a reservation for the purpose of determining the scope of immunity from state law. See Pet. App. A4 n.2, A15. That was error. In our view, trust allotments that are not within the boundaries of an Indian reservation should not necessarily be treated as the functional equivalent of a reservation for all purposes. The courts below therefore should have addressed at the outset whether the Tribe's 1867 Reservation was diminished by the 1890 allotment agreement and, if so, to what extent. The Court might choose to remand for resolution of that issue before addressing the remaining issues in the case. But if the Court chooses to resolve the diminishment issue itself, it should hold that all lands

[6] Other lands that subsequently were acquired and are held by the United States in trust for the Tribe also may be treated as the functional equivalent of a reservation, at least for some purposes. See *Citizen Band Potawatomi*, 111 S. Ct. at 910-911.

ceded by the Tribe in 1890 (including the allotted parcels) were removed from the Reservation.

A. The Allotment Agreement of 1890 Diminished the Sac and Fox Reservation

This Court's unanimous decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), summarizes the appropriate principles to apply in determining whether a reservation has been diminished or disestablished. The "first and governing principle is that only Congress can divest a reservation of its lands and diminish its boundaries." *Bartlett*, 465 U.S. at 470. Hence, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Ibid.* Naturally, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Ibid.* On that question, language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" strongly suggests that Congress meant to sever it from the reservation. Finally, "[w]hen * * * language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471. By contrast, an act that opens surplus lands for non-Indian settlement, with the proceeds of land sales to be held in trust for the Tribe, is interpreted as leaving the reservation boundaries intact. See *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962).

Application of those principles to this case strongly suggests that the only formal reservation remaining to respondent after implementation of the 1890 agreement is the 800 acres excepted from the cession of lands made under the allotment agreement. First, the 1890 allotment agreement required respondent to relinquish all lands within the boundaries of the 1867 Reservation (except for the two defined parcels totalling 800 acres), using unmistakable language of cession: "The said the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to [a particularly described parcel of land]." 26 Stat. 750.[7] Second, the agreement contained an unconditional promise by Congress to compensate respondent for the land opened to settlement: under Article II, the allotments to tribal members of parcels within the ceded tract constituted partial consideration to the Tribe for the cession; and Article IV required the United States to pay respondent $485,000 "[a]s a further and only additional consideration for the cession, conveyance, transfer, surrender and relinquishment of all title, claim and interest in and to the tract of land described in Article I hereof." 26 Stat. 752.[8] Accordingly, respondent is subject to the

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[7] See also Article II, 26 Stat. 751 (referring to "the cession, conveyance, transfer, surrender and relinquishment by said Sac and Fox Nation of all of their title, claim and interest, of every kind and character in and to the [parcel described in Article I]"); Article IV, 26 Stat. 752 (same).

[8] The amount of the compensation was subject to a downward adjustment if more than 528 members of the respondent tribe selected allotments, but we do not believe that renders the promise to pay sufficiently conditional to remove it from the principles described in *Bartlett*. Because there were 548

"almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Bartlett*, 465 U.S. at 470-471. We are aware of nothing that would support rejection of that presumption in this case.[9] Indeed, the Interior Department has formally determined that the ceded lands, including the allotments, ceased to be a "reservation," within the meaning of the federal statutes governing rights of way on reservations. *Status of Allotted Lands of Tribes Organized under Oklahoma Indian Welfare Act*, 59 Interior Dec. 1 (1945). Accordingly, the Court should conclude that the 1890 allotment agreement diminished the Reservation for present purposes as well.

B. The Allotment Agreement of 1890 Removed the Allotted Parcels from the Sac and Fox Reservation

As for the extent of the diminishment, the analysis applied by the Court in *Bartlett* suggests that the only formal reservation remaining to respondent is the 800 acres of the former reservation not included

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allottees rather than 528, see *Sac and Fox Tribe of Indians* v. *United States*, 340 F.2d 368, 369 (Ct. Cl. 1964); C.A. App. Exh. 15, such an adjustment apparently was made.

[9] The vast majority of the population in the area formerly covered by the reservation apparently are not members of the Tribe. See *Indian Reservations: A State and Federal Handbook* 238-239 (Confederation of American Indians 1986) (stating that respondent had 2,145 members as of 1984); Rand McNally, *Commercial Atlas and Marketing Guide* 456 (15th ed. 1984) (total 1980 population of 144,275 in the three counties in which the reservation formerly was located). Compare *Bartlett*, 465 U.S. at 480 (supporting holding that reservation had not been diminished by noting that areas opened to settlement were not predominantly occupied by white settlers).

in the cession made by Article I of that agreement. To be sure, the Court in *Bartlett* suggested that the diminishment of a reservation inferred from an agreement ceding lands would extend only to "unallotted opened lands," 465 U.S. at 470. But the logic of *Bartlett* is that a statement of cession of certain lands, coupled with compensation for those lands, supports the inference that Congress intended to diminish the reservation; if those features of a statute are adequate to establish diminishment, that also should be adequate to establish the extent of the diminution. Significantly, in this case the cession included not only the lands opened to white settlement, but also the lands on which allotments were made to members of the respondent Tribe. See Article II, 26 Stat. 751 (respondent's members were entitled to select allotments "in the tract of country hereinbefore described"); see also Article V, 26 Stat. 753 (opening to white settlement the "residue of said tract of country" remaining after allotments were made). Moreover, the compensation to respondent was paid in consideration for its cession of rights with respect to the whole parcel ceded by respondent, not just the portion opened to white settlement, and indeed the allotments to tribal members constituted partial consideration for the cession of the entire tract. See Art. II (allotments were made "[i]n consideration of the cession * * * of all of their title, claim and interest * * * to the lands described in the preceding Article"); Art. IV, 26 Stat. 752 (payment was "a further and only additional consideration for the cession * * * of all title, claim and interest in and to the tract of land

described in Article I hereof").[10] Accordingly, if the Court resolves the question, it should hold that the allotment agreement of 1890 removed the allotted parcels, as well as the land opened to settlement, from the formal Sac and Fox reservation.[11] See *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 216 (1943) (holding that allotments created by an allotment agreement with the Kickapoo Tribe substantively identical to the Sac and Fox agreement at issue here were no longer a portion of a "reservation" for right-of-way purposes).[12]

[10] The statement in *Bartlett* suggesting that disestablishment in some cases might be limited to unallotted lands is readily explained by the fact that the agreement in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)—on which the *Bartlett* Court relied as support for the comment in question, see 465 U.S. at 470—ceded only "unallotted lands," see *DeCoteau*, 420 U.S. at 445.

[11] Although the terms of the allotment agreement and the General Allotment Act of 1887 grant certain specified statutory protections to allotted parcels and those who received allotments, those specific protections do not, in themselves, afford tribal members an exemption from the state taxes that the Tribe challenges. First, the requirement in the allotment agreement that the United States convey fee title at the end of the trust period "free of all incumbrances," 26 Stat. 751, parallels language in the General Allotment Act requiring that title be conveyed "free of all charge or incumbrance whatsoever," 25 U.S.C. 348. That language has been interpreted to prohibit a tax on income derived from the allotment before the fee patent is issued to the Indian owner, on the theory that such a tax effectively would encumber the allotment during the trust period. *Squire* v. *Capoeman*, 351 U.S. 1, 6-10 (1956); cf. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 158-159 (1973) (tax exception for Indian trust land extends to property "permanently attached to the realty"). The exemption does not extend, however, to income that is not "derived directly" from the corpus of the trust. See *Capoeman*, 351 U.S. at 9 (discussing *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935), which permitted a tax on income earned by investment of the proceeds of an allotted parcel). Because the income at issue in this case is earned by personal services of the individuals, it is not derived directly from the allotted parcels. It follows that a tax on that income would not encumber the allotted parcel, even if the services are performed on the parcel or the wage-earner resides on the parcel.

A proviso added to the General Allotment Act by the Burke Act in 1906 also provides that "all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States." Act of May 8, 1906, ch. 2348, 34 Stat. 183 (codified at 25 U.S.C. 349). It is not clear, however, that the proviso applies to the Sac and Fox Nation, because the General Allotment Act, as originally enacted in 1887, did not apply to it. See Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 391 (codified at 25 U.S.C. 339). On the other hand, the Burke Act provision in question states that it "shall not extend to any Indians in the former Indian territory," 25 U.S.C. 349. At that time, the Sac and Fox Nation was located in the Oklahoma Territory, not the Indian Territory. See Act of Feb. 13, 1891, ch. 165, 26 Stat. 749 (preamble to Act approving allotment agreement of 1890, referring to respondent as "occupying a reservation in the Territory of Oklahoma"). Because a strong argument could be made that the pertinent exclusion in determining the scope of the 1906 Act is the one set forth in the 1906 Act, the Burke Act proviso arguably protects Sac and Fox allottees. In any event, respondent did not rely on those provisions in the court of appeals or in its brief in opposition in this Court. Accordingly, the Court need not resolve the issue in this case.

[12] As mentioned above, the Interior Department has applied the *Oklahoma Gas* ruling to deny reservation status to allotments made pursuant to the Sac and Fox agreement. *Status of Allotted Lands of Tribes Organized under the Oklahoma Indian Welfare Act*, 59 Interior Dec. 1 (1945).

II. FEDERAL LAW DOES NOT PERMIT THE STATES TO TAX INCOME IF IT IS EARNED FROM RESERVATION ACTIVITIES BY A RESIDENT OF THE RESERVATION COMMUNITY OR IF IT IS PAID BY THE TRIBE TO TRIBAL MEMBERS FOR PERFORMING SERVICES ASSOCIATED WITH THE ADMINISTRATION OF TRIBAL AFFAIRS

A. *McClanahan* v. *Arizona State Tax Commission* Bars States from Taxing Indian Income Only if It Is Earned by Indians Who Live and Work in a Reservation Community

Both of the lower courts concluded that the income tax at issue in this case was barred by the analysis in this Court's opinions in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991), and *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). In *Potawatomi*, the Court considered whether an Indian tribe had sovereign immunity from suit in connection with activities in which it engaged on land that was held in trust for the tribe by the United States. In the course of concluding that the tribe did have sovereign immunity, the Court stated that the trust land "qualifies as a reservation for tribal immunity purposes." 111 S. Ct. at 910. In *McClanahan*, the Court held that federal law preempted a state income tax imposed on the income earned from activities on the Navajo Reservation by a Navajo Indian who resided on that Reservation. 411 U.S. at 165, 179-180. Reading *Potawatomi* and *McClanahan* together, the court of appeals in this case concluded that the income tax at issue here was invalid because it applied to tribal members who provided services on "tribal lands," a term that the court apparently used to refer to lands held in trust for the Tribe or its members, see Pet. App. A5. The court of appeals read *McClanahan* too broadly.

The rationale of *McClanahan* was that income earned on the Navajo Reservation by a tribal member residing and working on the Reservation did not fall within the state's taxing jurisdiction.[13] By contrast, the decision of the court of appeals rests on the premise that petitioner cannot tax income earned by tribal members for services rendered to the Tribe on land held by the United States in trust for the Tribe or its members, without regard to residency of the individual employees. Although the trust allotments constitute "Indian country" for purposes of 18 U.S.C. 1151(a) and (c),[14] and thus are subject to federal criminal jurisdiction under 18 U.S.C. 1152 and 1153, it does not necessarily follow that individual allotments are to be considered a reservation in all respects, and that residency of a tribal member on an allotment outside the reservation is enough to give a tribal member the benefit of *McClanahan*. Thus, unlike the undiminished formal reservation land at issue in *McClanahan*, the allotted lands at issue here do not have a character such that activities or residence on them automatically places a tribal employee beyond the reach of the State's taxing juris-

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[13] See, *e.g.*, 411 U.S. at 168 (noting that "[i]t followed from th[e] concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries"); *id.* at 175 ("[T]his Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.").

[14] 18 U.S.C. 1151(c) extends the definition of "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished."

diction. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). Hence, the appropriate inquiry is whether the allotted trust lands and tribal members who live on them properly should be considered part of a reservation community.

Nothing in *Potawatomi* should be read to alter this conclusion, and rigidly to require that trust allotments be treated categorically the same as a reservation. The land at issue in *Potawatomi* was owned in trust for the tribe itself; it was not an allotment held in trust for an individual Indian. Moreover, *Potawatomi* involved the sovereign immunity of the tribe itself, not the immunity of persons who simply deal with the tribe. It is one thing to say that States can tax individuals who receive money from an Indian tribe; it is quite another to suggest that States can tax or sue the tribe itself. In sum, *Potawatomi* cannot be read as a blanket extension of all of the protections traditionally accorded to Indian reservations to land whose sole connection to an Indian tribe is that it originally was allotted to a member of that tribe.

Although the Court's decisions in this area have not explored the relevant principles in detail, we believe that *McClanahan* reflects the fundamental principle that Indians who are part of a reservation community—living there and earning their income there—are beyond the reach of the State's taxing jurisdiction. For that reason, the court of appeals erred in extending *McClanahan*'s protections to tribal members without regard to their residence. The ramifications of the court of appeals' view on that

point are striking; any Indian residing in Oklahoma City could avoid the state income tax by accepting any job on his tribe's reservation. The protections customarily afforded to Indians do not extend so far. Cf. *Morton* v. *Ruiz*, 415 U.S. 199, 222 (1974) (referring to BIA practice with respect to "Indians who had left the reservations and moved to urban areas or who had attempted to be assimilated by the general population").

On the other hand, although the analytical basis for *McClanahan* was the definitively separate status of Indian reservations, the exemption from state jurisdiction discussed in that case should not always end at the formal reservation boundary. There are many Indian tribes in this country, and Congress has used various means to provide for the welfare of their members, means that are not always strictly limited to reservations. In some cases, unassimilated Indians live and work near a reservation as part of a reservation community.[15] In such a situation, Indians residing near the reservation, like those residing on it, may be exempt from state income taxes, especially if they reside on trust allotments. Cf. 18 U.S.C. 1152(b) ("Indian country" includes "all dependent Indian communities"); 42 U.S.C. 2000e-2(i) (prohibitions in Title VII do not apply to "any business or enterprise on *or near* an Indian reservation" (emphasis added).

In this case, both of the lower courts proceeded on the assumption that all lands allotted to members of an Indian tribe *automatically* continue as the func-

[15] See *Ruiz*, 415 U.S. at 224 (noting circumstances in which " 'leaving the reservation' meant something far different from moving 15 miles to a nonurban Indian village, while still maintaining close ties with the native reservation").

tional equivalent of a reservation for tax immunity purposes so long as the allotments remain in trust or restricted status, and that *McClanahan* requires nothing more than that the income of a tribal member be earned on trust lands, without regard for the residency of the individual, in order to be immune from the States' taxing powers. For the reasons stated above, those assumptions are incorrect. Because the formal reservation in this case was almost entirely disestablished, tribal members residing on allotted parcels should retain immunity from taxation only if they live and work as part of a reservation community. Because the lower courts did not address this question, or evaluate the evidence in the record (including the location and status of the trust allotments, see, *e.g.*, C.A. App. Exh. 15 (map of tribal lands and allotted parcels[16])) in this light, it would be appropriate for the Court to remand the case to allow the district court to consider the issue in the first instance.

B. Respondent's Interest in Self-Government May Bar Petitioner from Imposing an Income Tax on Salaries Respondent Pays to Tribal Members for Performing Services Associated with the Administration of Tribal Affairs

In addition to whatever immunity from the state income tax the Tribe's members might have to the extent they live and work in "Indian country" as part of a reservation community, members of the

[16] As a result of the fractionation process described in *Hodel* v. *Irving*, 481 U.S. 704 (1987), some of the allotments originally made to members of the Tribe may now be owned or occupied largely by persons who have little or no ongoing relationship with the Tribe.

Tribe who are employed by the Tribe itself (the only tribal members at issue here) also might have a measure of immunity drawn from "the right of reservation Indians to make their own laws and be ruled by them," *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). Because the Court's previous decisions generally have relied upon pervasive federal regulation of an activity, rather than Indian self-determination, as the basis for displacing state taxation of Indian affairs, see, *e.g.*, *ibid.*; *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 (1982), the Court has not clarified the standards that would apply to such a claim. In our view, however, although respondent did not raise the issue in precisely this form in the courts below,[17] the circumstances of this case suggest the basis for a substantial argument that the challenged tax, at least in some cases, improperly infringes on respondent's interest in self-government.

It is common ground that the income in question is paid by respondent to its members as compensation for personal services rendered to the respondent Tribe.[18] Moreover, although the record does not re-

[17] We believe that this argument may be considered by the Court in light of respondent's argument to the court of appeals that petitioner's taxes were invalid because of "interference with tribal self-government." Resp. C.A. Br. 22-23. Respondent is entitled to assert any argument presented to the court of appeals as a basis for affirming the judgment of the court of appeals. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

[18] See Pet. i (first question presented relates to "Sac and Fox tribal members who are employed by the Sac and Fox Nation").

flect this, it is our understanding that the great majority of the income is received in return for services rendered at the tribal headquarters on respondent's extant reservation. Hence, it seems quite likely that the tax directly burdens the administration of the respondent Tribe by increasing the cost of administering tribal affairs, in areas subject to its jurisdiction.[19] That result is particularly problematic in light of the express protection in the allotment agreement of 1890 for the continuing use of that land by the Sac and Fox Agency and for a farm and school for the benefit of the Tribe as a whole. See 26 Stat. at 750-751. Application of the state income tax to tribal members in this case therefore may pose a substantial risk of an infringement on the right of reservation Indians to make their own laws and be ruled by them to the extent it burdens the Tribe's sovereign right to establish relationships with tribal officers and employees on reservation land without state interference.

In determining whether federal law preempts a particular assertion of state authority over an Indian reservation, the Court generally has conducted "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *E.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980)). In our view,

[19] See, *e.g.*, C.A. App. Exh. 46 (affidavit of Truman Carter, Treasurer of the Tribe, indicating that the challenged tax has been applied to the income he earns performing services for the Tribe); J.A. 20 (list of proposed witnesses for trial, indicating that petitioner applies the tax to the Chief, Second Chief, and Tax Commissioner of the Tribe).

a similar inquiry would be appropriate here.[20] Because the district court disposed of the present case on cross-motions for summary judgment, the record does not at this time provide an adequate basis for such an inquiry. Accordingly, it would be appropriate to vacate the judgment of the court of appeals with respect to the income tax for this additional reason, and remand the case so that the district court may consider this possible basis for preemption of the state income tax along with the possible claim based on the existence of a reservation community.

III. FEDERAL LAW DOES NOT AUTOMATICALLY BAR OKLAHOMA FROM IMPOSING PROPERTY TAXES ON VEHICLES OWNED BY INDIANS WHO RESIDE ON TRUST ALLOTMENTS OUTSIDE AN INDIAN RESERVATION

As discussed above, this case also involves two taxes petitioner has imposed on motor vehicles used in the State: an excise tax on the use of any vehicle registered in the State, 68 Okla. Stat. Ann. § 2103 (West 1992), and vehicle registration fees required to be paid by anyone owning a vehicle used in the State, 47 Okla. Stat. Ann. § 1132.A (West Supp. 1992). The lower courts erred in invalidating those taxes.

The only substantial bases offered for the decision of the lower courts were this Court's decisions in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425

[20] Although the Court has adopted a per se rule as regards state taxation of activities on a reservation, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), we believe, for the reasons stated in Point II.A, *supra*, that this per se rule should not apply here unless the tribal members reside (as well as work) as part of a reservation community.

U.S. 63 (1976), and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Those decisions invalidated taxes imposed on vehicles owned by an Indian tribe or its members who resided on a reservation. As we have discussed above, respondent's formal reservation is now limited to a small tract of land on which the tribal headquarters is located, and we understand that none of the Tribe's members live on that reservation. Accordingly, the decisions in *Moe* and *Colville* do not strictly apply. See *Colville*, 447 U.S. at 163-164 (noting that *Moe* held that a property tax "could not validly be applied to motor vehicles owned by tribal members who resided on the reservation"; commenting that the State "may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles").

On the other hand, just as with the income tax discussed above, it is possible in some cases that Indians who do not live within the formal boundaries of a reservation nevertheless will be part of a single reservation community that should be exempt from state taxes, whether on income or personal property. Because the court of appeals did not consider the State's taxing jurisdiction in this more focused light—but instead treated trust allotments as the equivalent of a reservation for this purpose, Pet. App. A6-A7—we suggest that the case be remanded to the district court for further consideration of the validity of the motor vehicle taxes and fees at issue in this case.[21]

[21] *Colville* does suggest that a State might be obligated to prorate motor vehicle taxes to account for on-reservation use. 447 U.S. at 163. Respondent did not allege in its complaint, however, that the vehicles were used primarily on the small reservation it still holds, or on individual allotments, or even that the use of the vehicles for transportation (as opposed to parking) occurs on *either* tribal or individual trust lands. See Compl. ¶¶ 18-28, J.A. 4-6. Both the excise tax and the registration fee are related to the use and value of the motor vehicle, which in turn rests on its use and value for transportation. If in fact all use of the vehicle for transportation occurs off of trust lands, as the record suggests, we see no basis for holding that the motor vehicle assessments are invalid.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to the court of appeals with directions to remand to the district court for further consideration in light of the views expressed in this brief.

Respectfully submitted.

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